

No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1943

TERRY LAVINIA HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was indicted in the District Court for the Southern District of Georgia for wilfully and knowingly failing to perform a duty required of him under the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 301–318), in that he failed to report for work of national importance as required by an order duly issued to him by his local Selective Service board pursuant to his classification in Class IV–E as a conscientious objector to both combatant and noncombatant military service (R. 2–4).

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At his trial before a jury the court permitted petitioner to adduce evidence in support of his contention that as a member of Jehovah's Witnesses he was a minister of religion and therefore wholly exempt from training and service under the Act (see R. 115–127, 148–158, 165–169, 186–188). At the close of the evidence, outside of the presence of the jury (R. 196), the judge ruled that there was substantial evidence supporting petitioner's classification in Class IV-E (R. 199) and that there was no evidence that his classification was arbitrary or capricious (R. 200). Accordingly, the judge instructed the jury that petitioner's classification was final and conclusive upon the court and the jury (R. 213) and that the only issues of fact open for the jury's consideration were whether petitioner was commanded by lawful authority to report for work of national importance and whether he knowingly refused to report (R. 218).

Petitioner was convicted (R. 4) and sentenced to three years' imprisonment (R. 5–6). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the conviction was affirmed (R. 238–240).

Petitioner's sole contention here is that he was entitled to have the jury try *de novo* the merits of his classification (Pet. 1, 3, 4, 8–14). That contention is no longer open in view of the

decision of this Court in *Falbo* v. *United States*, No. 73, decided January 3, 1944.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JANUARY 1944.

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